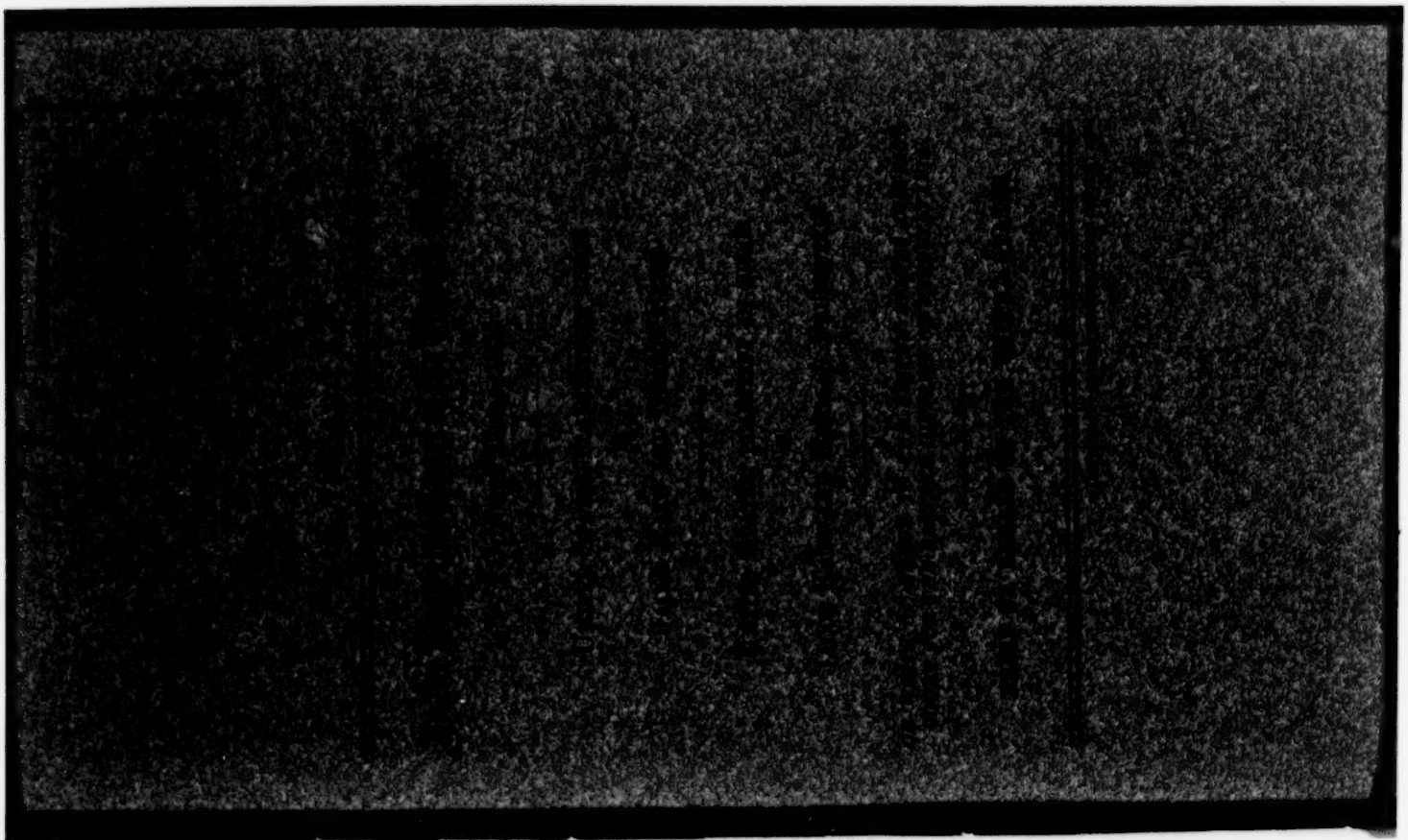

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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 726

UNITED STATES, PLAINTIFF IN ERROR

v.

JACOB KATZ AND GEORGE SENN

No. 727

UNITED STATES, PLAINTIFF IN ERROR

v.

JACOB KATZ AND HERMAN FEUERSTEIN

ON WRITS OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF ON BEHALF OF THE UNITED STATES

OPINION OF THE COURT BELOW

The opinion of the District Court will be found in 5 F. (2d) 527 and on page 5 of the Record in Case No. 726 and on page 4 in Case No. 727.

JURISDICTION

These cases come before the Court on writs of error granted to the Government on July 6, 1925, under the provisions of the Criminal Appeals Act of March 2, 1907, Chap. 2564, 34 Stat. 1246, following the decision of Judge Thompson on the same day in sustaining demurrers to indictments for conspiracies to violate the National Prohibition Act. (R. 8, 9, No. 726; R. 7, 8, No. 727.)

STATEMENT

Defendants in error were charged in two indictments, filed March 6, 1925, in the District Court for the Eastern District of Pennsylvania, with conspiracy to commit the offense of selling whiskey without making a permanent record as required by Section 10, Title II, of the National Prohibition Act.

In case No. 726 the indictment charged that defendants Jacob Katz and George Senn entered into a conspiracy to commit an offense against the United States, to wit, the offense on the part of Katz of selling to Senn, for the Stewart Distilling Company, 750 cases of whiskey without making the permanent record required under Section 10, Title II, of the National Prohibition Act. (R. 2–3.)

In case No. 727 the indictment charged that defendants Katz and Herman Feuerstein conspired to commit an offense against the United States, to wit, the offense on the part of Katz of selling to Feuerstein, for the Stewart Distilling Company, 25

barrels of whiskey, without making the permanent record required by said Section 10. (R. 2.)

Demurrers and motions to quash the indictments were interposed on the theory that the aforesaid section applied only to persons holding permits and, as the indictments failed to allege that either Katz or the Stewart Distilling Company held permits to sell, no offense was charged under the statute. (R. 5, 6, No. 726; R. 4, 5, No. 727.)

As the two indictments charged similar offenses, they were considered together and disposed of by the court at the same time.

The court sustained the demurrers and quashed the indictments (R. 8, No. 726; R. 7, No. 727), whereupon writs of error were sued out by the Government, as above stated.

STATUTE INVOLVED

The statute involved in this case is Section 10, Title II, of the National Prohibition Act (Chap. 85, 41 Stat. 305, 312), reading as follows:

> No person shall manufacture, purchase for sale, sell, or transport any liquor without making at the time a permanent record thereof showing in detail the amount and kind of liquor manufactured, purchased, sold, or transported, together with the names and addresses of the persons to whom sold, in case of sale, and the consignor and consignee in case of transportation, and the time and place of such manufacture, sale, or transportation. The commissioner may pre-

scribe the form of such record, which shall at all times be open to inspection as in this Act provided.

QUESTION PRESENTED

The question presented is whether the above section requiring the making of a permanent record, includes all persons who sell liquor, whether permit holders or not, or whether it applies only to persons holding permits under the National Prohibition Act. In other words, whether an indictment, in order to state an offense under the statute must charge that at the time the offense was committed the defendants held permits to sell.

ARGUMENT

SUMMARY

I. The terms of the statute being plain and unambiguous, it should have been given a literal construction.

II. The court erred in resorting to maxims to aid in the construction of the statute.

III. Decisions under the Anti-Narcotic Act are not applicable to this case.

I

THE TERMS OF THE STATUTE BEING PLAIN AND UNAMBIGUOUS, IT SHOULD HAVE BEEN GIVEN A LITERAL CONSTRUCTION

The Eighteenth Amendment provides that " the manufacture, sale, or transportation of intoxicating liquors within * * * the United States

* * * for beverage purposes is hereby prohibited " (Sec. 1); and that " Congress and the several States shall have concurrent power to enforce this Article by appropriate legislation " (Sec. 2).

The National Prohibition Act enacted in pursuance of this Amendment provides that no person shall " manufacture, sell, barter, transport, import, export, deliver, furnish, or possess any intoxicating liquor " except as authorized in the Act; that all its provisions shall be liberally construed to the end that " the use of intoxicating liquor as a beverage " may be prevented, and that intoxicating liquor " for nonbeverage purposes " may be manufactured, sold, etc., " but only " as provided in the Act, and the Commissioner of Internal Revenue may issue permits therefor (Sec. 3, Title II); that no one shall manufacture, sell, etc., intoxicating liquor without first obtaining a permit from the Commissioner, with exceptions not here material (Sec. 6, Title II); that it shall be unlawful to possess any liquor or property designed for the manufacture of liquor intended for use in violating this title, and no property rights shall exist in such liquor or property (Sec. 25, Title II); that it shall not be necessary to include any defensive negative averments in an indictment or information (Sec. 32, Title II); and that after February 1, 1920, the possession of liquors by any person not legally permitted " under this title to possess liquor shall be prima facie evidence that

> from ambiguity and doubt, and express plainly, clearly and distinctly the sense of the framers of the instrument, there is no occasion to resort to other means of interpretation. It is not allowable to interpret what has no need of interpretation." The statute itself furnishes the best means of its own exposition; and if the sense in which words were intended to be used can be clearly ascertained from its parts and provisions, the intention thus indicated will prevail without resorting to other means of aiding in the construction. Very strong expressions have been used by the courts to emphasize the principle that they are to derive their knowledge of the legislative intention from the words or language of the statute itself which the legislature has used to express it, if a knowledge of it can be so derived.

The same author (p. 700) quotes the following from the language of the Maryland Court of Appeals in *Alexander* v. *Worthington,* 5 Md. 485:

> We are not at liberty to imagine an intent and bind the letter of the act to that intent; much less can we indulge in the license of striking out and inserting and remodeling, with the view of making the letter express an intent which the statute in its native form does not evidence. Every construction, therefore, is vicious which requires great changes in the letter of the statute, and, of

> the several constructions, that is to be preferred which introduces the most general and uniform remedy.

In *United States* v. *Goldenberg,* 168 U. S. 95, this Court said (pp. 102–103):

> The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent.

But the court below disregarded this rule and held, erroneously, as we contend, that there was nothing in Section 10 to indicate that Congress intended it to apply to nonpermit holders. The court admitted that the section does not describe those who are prohibited from selling without making a record as those only who hold permits, but in reaching the conclusion that such was the intent of the statute, the court resorted to the maxims "*ex antecedentibus et consequentibus fit optima interpretatio*" and "*noscitur a sociis.*"

II

THE COURT ERRED IN RESORTING TO MAXIMS TO AID IN THE CONSTRUCTION OF THE STATUTE

One reason for applying the above maxims was because of the association of Section 10 with other provisions in the Act dealing with permits.

Of the permit provisions immediately preceding Section 10, Section 6 prohibits selling without first obtaining a permit; prescribes details concerning the time when permits to sell shall expire, and the length of time permits to purchase shall be in force; provides what the permits shall specify, and prohibits their issue to persons violating the terms of prior permits. It provides for the prescribing by the Commissioner of Internal Revenue of forms of permits and applications; empowers that official to require bonds, and provides for the review of his decision by a court of equity in the event of a refusal of an application for a permit. Section 7 pertains to permits for physicians. Section 8 directs the Commissioner to cause blanks to be printed and furnished to physicians holding permits and directs the manner in which they shall be used. Section 9 provides for citation of those holding permits to appear before the Commissioner and authorizes revocation for cause shown.

Of the sections immediately following Section 10, Section 11 requires manufacturers and wholesale

or retail druggists to keep as part of the records required of them a copy of all permits to purchase on which sales are made, and prohibits their selling to persons not having permits to purchase. Section 12 directs that all persons manufacturing liquor for sale shall attach to the container a label giving the name of the manufacturer of the liquor, etc., and the number of the permit authorizing the manufacture thereof. Section 13 pertains to carriers' records or authorizes delivery only to persons presenting permits to purchase.

It will be seen, however, that these provisions are quite unlike those contained in Section 10. No reference is made in that section to permits or permit holders. It contains none of the regulatory provisions pertaining to those holding permits. It states that *no person* shall manufacture, purchase for sale, sell, or transport liquor without making certain records. This certainly is open to the construction that *all persons,* whether permit holders or not, are included within the statute.

Furthermore, no special significance can be attached to the location of this section at that particular place in the statute. It could just as readily have been inserted elsewhere. The order in which provisions occur in a statute is immaterial where the meaning is plain. Sutherland on Statutory Constructon, *supra,* Sec. 344; *Gibbons* v. *Brittenum,* 56 Miss. 232, 257. This particular provision is not new in the legislative field. Similar

provisions are to be found in the old Internal Revenue Laws. It undoubtedly was taken from Section 3318, Revised Statutes, as amended by the Act of February 27, 1877, Chap. 69, 19 Stat. 240, 248, and by Section 5, Act of March 1, 1879, Chap. 125, 20 Stat. 327, 339, which contains provisions similar to those found in Section 10. There is this distinction, however. That statute requires the book or record to be kept only by the rectifier or wholesale liquor dealer, while here the record is to be kept by every person manufacturing and trafficking in liquor. See also Section 3303, Revised Statutes, pertaining to records to be kept by distillers.

A more grievous error, however, as the Government views the case, was made by the court when it resorted to maxims to aid in the construction of a statute that is clear and unambiguous on its face. The quotation adopted by the court from 26 A. and E. Ency. of Law, 616, contains this statement: "In construing a section of an act regard must first be had to the language of the clause itself." The Government contends that the court had no right to resort to the maxims employed by it and thereby to read into the statute a distinction which Congress neither made nor intended to make.

Benson v. *Chicago, Etc., Ry. Co.*, 75 Minn. 163, involved a statute giving a right of action to railroad employees injured by the negligence of a co-employee while engaged in operating passenger, freight or other trains, engines or cars. It was

held that the word "cars" included hand-cars. The claim was made that being associated with trains and engines it meant only cars usually operated in trains and by means of locomotives. The court said (p. 167):

> A court has no right to resort to the maxims of *noscitur a sociis* or *ejusdem generis* for the purpose of reading into a statute a distinction which the legislature neither made nor intended to make. These rules are not the masters of the courts, but merely their servants, to aid them in ascertaining the legislative intent. They afford a mere suggestion to the judicial mind that, where it clearly appears that the lawmakers were thinking of a particular class of persons or objects, their words of more general description may not have been intended to embrace any other than those within the class. Hand cars are used in the ordinary business of railroads. As already suggested, their use is within the mischief of the statute.

Even under the rule of strict construction of penal statutes the court's decision should not be sustained. Particularly applicable here, when the evil to be remedied and the object to be attained by the National Prohibition Act are taken into consideration, is the language found in the opinion of this Court in *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1. The question there was whether locomotive engines were included in the words "any

car " contained in the Safety Appliance Act then before the court and which required cars engaged in interstate commerce to be equipped with automatic couplers. In holding that engines were so included this Court said (p. 17):

> The primary object of the act was to promote the public welfare by securing the safety of employees and travelers, * * *.
>
> Moreover, it is settled that " though penal laws are to be construed strictly, yet the intention of the legislature must govern in the construction of penal as well as other statutes; and they are not to be construed so strictly as to defeat the obvious intention of the legislature."

The Court then cited (p. 18) *United States* v. *Lacher,* 134 U. S. 624, where it quoted from *United States* v. *Winn,* 3 Sumn. 209, in which Mr. Justice Story, referring to the rule that penal statutes are to be construed strictly, said:

> I agree to that rule in its true and sober sense; and that is, that penal statutes are not to be enlarged by implication, or extended to cases not obviously within their words and purport. But where the words are general, and include various classes of persons, I know of no authority, which would justify the court in restricting them to one class, or in giving them the narrowest interpretation, where the mischief to be redressed by the statute is equally applicable to all of them. And where a word is used in a statute, which has various known significations, I know of

> no rule, that requires the court to adopt one in preference to another, simply because it is more restrained, if the objects of the statute equally apply to the largest and broadest sense of the word. In short, it appears to me, that the proper course in all these cases, is to search out and follow the true intent of the legislature, and to adopt that sense of the words which harmonizes best with the context, and promotes in the fullest manner, the apparent policy and objects of the legislature.

Equally applicable is the case of *United States* v. *Corbett,* 215 U. S. 233, where this Court, in holding that the words " any agent " found in Section 5209, Revised Statutes, were intended to embrace the Comptroller of the Currency, said (pp. 242–243):

> The rule of strict construction does not require that the narrowest technical meaning be given to the words employed in a criminal statute in disregard of their context and in frustration of the obvious legislative intent. *United States* v. *Hartwell,* 6 Wall. 385. In that case, answering the contention that penal laws are to be construed strictly, the court said (p. 395):
>
> " The object in construing penal, as well as other statutes, is to ascertain the legislative intent. * * * The words must not be narrowed to the exclusion of what the legislature intended to embrace; but that intention must be gathered from the words,

and they must be such as to leave no room for a reasonable doubt upon the subject. * * * The rule of strict construction is not violated by permitting the words of the statute to have their full meaning, or the more extended of two meanings, as the wider popular instead of the more narrow technical one; but the words should be taken in such a sense, bent neither one way nor the other, as will best manifest the legislative intent."

It is to be observed that the rule thus stated affords no ground for extending a penal staute beyond its plain meaning. But it inculcates that a meaning which is within the text and within its clear intent is not to be departed from because, by resorting to a narrow and technical interpretation of particular words, the plain meaning may be distorted and the obvious purpose of the law be frustrated.

See also:

Bolles v. *Outing Co.*, 175 U. S. 262, 265.

United States v. *Lexington Mill Co.*, 232 U. S. 399, 409.

Ash Sheep Co. v. *United States*, 252 U. S. 159, 170.

But even if in the District Court's view of the statute it felt constrained to go outside for aids of construction, we earnestly contend that it should not have confined itself to the provisions im-

U.S. v Cisco 262/165-167

mediately surrounding Section 10 but should have considered the statute as a whole. In *Rice* v. *Ashland County,* 108 Wis. 189, 192, it was said:

> We must * * * look to the Act as a whole, to the subject with which it deals, to the reason and spirit of the enactment, and thereby, if possible, discover its real purpose.

The court should have considered all parts of the Act, especially those providing that no person shall manufacture and traffic in intoxicating liquor except as authorized by the Act; that it shall be unlawful to possess any liquor or property designed for the manufacture of liquor intended for use in violation of the Act and no property rights shall exist in such liquor or property, and that *all* provisions of the statute shall be liberally construed in order that the unlawful use of intoxicating liquor may be prevented. Section 10 should have been construed with reference to the whole system of prohibition enforcement, of which it forms a part. See *McDougald* v. *Dougherty,* 14 Ga. 674, 681. The purpose is to harmonize one part of an act with another in accord with its general intent. If the court had considered the entire statute, with a view to giving a liberal construction to all its provisions, as Congress evidently intended, we believe it would not have, in effect, substituted one set of words for another.

III

DECISIONS UNDER THE ANTI-NARCOTIC ACT ARE NOT APPLICABLE TO THIS CASE

In reaching its conclusion the court below relied on certain decisions under the Harrison Anti-Narcotic Act, among them the decision of this Court in *United States* v. *Jin Fuey Moy,* 241 U. S. 394. These decisions, however, are not controlling here. There is a marked distinction between the Anti-Narcotic Act and the statute under consideration. The title of the Anti-Narcotic Act (Chap. 1, 38 Stat. 785), reads:

> An Act to provide for the registration of, with collectors of internal revenue, and to impose a special tax upon all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium or coca leaves, their salts, derivatives, or preparations, and for other purposes.

Section 1 provides:

> That * * * *every person who* * * * sells, * * * opium * * * shall register with the collector of internal revenue * * *. At the time of such registry and on or before the first day of July, annually thereafter, every person who * * * sells, * * * any of the aforesaid drugs shall pay to the said collector a special tax * * *.

> It shall be unlawful for any person required to register under the terms of this Act to * * * sell, * * * any of the aforesaid drugs without having registered and paid the special tax provided for in this section. * * * (Italics ours.)

Section 8, on which many of the cases cited by the court are based, declares:

> That it shall be unlawful for any person *not registered under the provisions of this Act*, and who has not paid the special tax provided for by this Act, to have in his possession or under his control any of the aforesaid drugs; and such possession or control shall be presumptive evidence of a violation of *this section*, and also of a violation of the provisions of *section one* of this Act. * * * (Italics ours.)

The possession forbidden by Section 8 is of a person " not registered under the provisions of this Act "—not possession generally by all persons. The offense is not the possession of the drug, but the possession for some of the purposes for which registration is required, without having registered and paid the tax. Plainly the person who has not so registered and paid the required tax refers only to one who is required by Section 1 of the Act to register and pay such tax. No possession is referred to by " this section " of which there can be a violation other than the possession of one who is required by Section 1 to register and pay the tax. And so, as the indictments in the cases re-

ferred to did not charge that the defendants were persons required to register under the Act, it was held that they stated no offense. In the *Jin Fuey Moy* case, *supra,* this Court, while recognizing that the statute had a moral end in view, treated it as a revenue measure, and for this reason may have refrained from giving it a liberal construction.

The National Prohibition Act is not a revenue statute but, as heretofore pointed out, is designed to abolish the traffic in intoxicating liquors for beverage purposes, and to that end should be liberally construed. Section 10 contains no restriction or qualification such as is found in Section 8 of the Anti-Narcotic Act that it shall apply only to persons who have registered or taken out permits under the Act. It directs that *no person* shall deal in liquor without making a permanent record. In other words, it requires every person selling liquor to make a record. The reference in Section 8 of the Anti-Narcotic Act is not to all persons, but to any person " not registered under the provisions of this Act." In view of these distinctions in the two statutes, it is submitted that the cases relied on have no bearing upon the validity of the present indictments.

The court's construction of the Act, that only persons holding basic permits can be guilty of violating the requirement of making permanent records, has the effect of rewarding the bootlegger, illegitimate drug concerns, and others, to whom no

licenses will be issued, by subjecting them to a less penalty than is imposed upon the legitimate dealers who sell liquor under a permit. If, for example, the legitimate dealer, who complied with the law by securing a permit, were charged with transporting and selling in violation of his permit, and also with failing to make a permanent record, he could be prosecuted for all three offense, while the bootlegger and illegitimate dealer, equally guilty of unlawful sale and transportation and of failing to make a record, could be prosecuted only for the first two offenses and not for the latter, merely because he had failed or refused to comply with the law by taking out a permit. Obviously this cannot have been the intention of Congress. It is not in keeping with the object intended to be accomplished by the Act.

The true meaning of any clause or provisions in an act is that which best accords with its object and general purpose. The object and general purpose of the National Prohibition Act have been described as " to conserve public health and morals, and to that end to keep watch and ward over all movement of liquors from start to finish." *United States* v. *One Cole Automobile,* 273 Fed. 934, 936. If Congress had intended Section 10 to apply only to permit holders, it is reasonable to assume it would have said so instead of employing the broad, general language found in that section. Moreover, the court's interpretation leads to an absurd re-

sult. A statute should not be given an absurd interpretation. An interpretation which leads to consequences that are mischievous and absurd is inadmissible, if the statute is susceptible of any other interpretation, for such consequences can not be deemed intended.

The court seems to have been influenced by the provision in the latter part of Section 10 that the Commissioner of Internal Revenue may prescribe the form of such record, which at all times shall be open to inspection as provided in the Act. The court construes this provision as mandatory on the Commissioner, and therefore as requiring the record to be made on the form prescribed by him. If this were so, the duty of keeping the record would arise only when, and be dependent upon whether, the Commissioner had prescribed the form of such record, and a defendant would be enabled to escape punishment for failing to keep a record on the excuse or ground that the Commissioner had failed to prescribe a form. This cannot have been the intent of Congress in view of the fact that, in the first part of the Act, it imposed the mandatory and unqualified duty of keeping a record by everyone manufacturing and selling liquor. It seems clear from a reading of the whole section that the duty of keeping a record is manda-

tory and that the prescribing of the form is discretionary with the Commissioner.

Prosecutions for violations of Section 10 by nonpermit holders have heretofore been sustained.

> *De Witt* v. *United States,* 291 Fed. 995, C. C. A. 6th. (Certiorari denied, 263 U. S. 714.)
>
> *Edenfield* v. *United States,* 8 F. (2d) 614, C. C. A. 5th. (Petition for writ of certiorari now pending in this Court.)
>
> *Ex Parte Poole,* 273 Fed. 623, Mont.

The opinion of the Circuit Court of Appeals for the Sixth Circuit in *Small Grain Distilling & Drug Company* v. *Hamilton,* 276 Fed. 544, 546, expresses the Government's view of this statute:

> It provides for a general and primary record to be made by every person handling liquor, whether that person is vendor, or vendee, or carrier, and it prescribes a duty for every person concerned in the sale or delivery.

CONCLUSION

In view of the foregoing, the Government submits that the court below erred in its construction of the statute and in holding that the indictments in question did not state an offense because they failed to charge that the defendants who sold the liquor without making the required record were permit holders under the Government. The judg-

ment of the court sustaining the demurrers and quashing the indictments should, therefore, be reversed.

Respectfully submitted.

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Nos. 726 and 727

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1925

United States, Plaintiff in Error

v.

Jacob Katz and George Senn

United States, Plaintiff in Error

v.

Jacob Katz and Herman Feuerstein

On Writs of Error to the United States District Court for the Eastern District of Pennsylvania

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v.

JACOB KATZ and HERMAN FEUERSTEIN.

ON WRITS OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF ON BEHALF OF DEFENDANTS IN ERROR.

In the cases now before the Court, the District Court of the United States for the Eastern District of Pennsylvania entered an order sustaining demurrers to two bills of indictment and quashing and dismissing the indictments.

In one bill of indictment No. 1123 as of December Term, 1924, it was charged that the defendants, Jacob Katz and Herman Feuerstein, conspired to commit an offense against

the United States, to wit, the offense on the part of Katz of selling for the Stewart Distilling Company to Senn 250 cases of whiskey without making a permanent record as required under Section 10 of the National Prohibition Act.

In the other indictment No. 1124, as of December Term, 1924, it was charged that the defendants, Katz and Feuerstein, conspired to commit an offense against the United States, to wit, the offense on the part of Katz of selling for the Stewart Distilling Company to Feuerstein 25 barrels of whiskey without making a permanent record as required by Section 10 of the National Prohibition Act.

The reason for the sustaining of the demurrers and quashing of the bills of indictment, as more fully appears from the opinion of the District Court on page 5 of the record in case No. 726 and page 4 in case No. 727, was that the indictments fail to set forth an offense against the United States inasmuch as Section 10 of the National Prohibition Act, under which they were framed, applies only to persons holding permits for dealing in intoxicating liquor.

It is respectfully submitted that the District Court committed no error in the entry of its orders which are brought before this Court upon the writs of error in this cause and that its decision should be affirmed.

UNDER A FAIR AND PROPER CONSTRUCTION OF TITLE II OF THE NATIONAL PROHIBITION ACT A PERMANENT RECORD OF THE MANUFACTURE, PURCHASE, SALE OR TRANSPORTATION OF LIQUOR IS REQUIRED TO BE KEPT ONLY BY PERMIT HOLDERS.

The National Prohibition Act is more than an Act prohibiting intoxicating beverages as contended for by the Government. The title of the Act itself is as follows:

> "An Act to prohibit intoxicating beverages and to regulate the manufacture, production, use and sale of

high proof spirits for other than beverage purposes, and to insure an ample supply of alcohol and promote its use in scientific research and in the development of fuel, dye and other lawful industries" Chap. 85, 41 Stat. 305, United States at Large, Vol. 1, Part I, page 305.

It is thus seen that the purpose of the Act is to regu-te the manufacture, production, use and sale of high proof pirits for other than beverage purposes and to insure an mple supply of alcohol and promote its use, as well as to rohibit intoxicating beverages.

By Section 3 of Title II of the National Prohibition ct, it is provided:

"No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish, or possess any intoxicating liquor except as authorized in this Act, and all the provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.

"Liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished and possessed, but only as herein provided, and the commissioner may, upon application, issue permits therefor: PROVIDED, That nothing in this Act shall prohibit the purchase and sale of warehouse receipts covering distilled spirits on deposit in Government bonded warehouses, and no special tax liability shall attach to the business of purchasing and selling such warehouse receipts."

By this section, the dealing in liquor by all persons ther than those expressly excepted by the provisions of

the National Prohibition Act is prohibited, and the purpose of Congress to prohibit intoxicating beverages is carried into effect by its provisions.

Section 4 of the Act provides that certain articles, when manufactured and prepared, for market, shall not be subject to the provisions of the Act. After enumerating these articles, it further provides:

> "A person who manufactures any of the articles mentioned in this section may purchase or possess liquor for that purpose, but he shall secure permits to manufacture such articles and to purchase such liquor, give the bonds, keep the records, and make the report specified in this Act and as directed by the commissioner."

Section 6 of the Act provides:

> "No one shall manufacture, sell, purchase, transport, or prescribe any liquor without first obtaining a permit from the commissioner so to do, except that a person may, without a permit, purchase and use liquor for medicinal purposes when prescribed by a physician as herein provided, and except that any person who in the opinion of the commissioner is conducting a bona fide hospital or sanitorium engaged in the treatment of persons suffering from alcoholism, may, under such rules, regulations, and conditions as the commissioner shall prescribe, purchase and use, in accordance with the methods in use in such institution, liquor, to be administered to the patients of such institution under the direction of a duly qualified physician employed by such institution."

Section 7 provides that no one but a physician, holding a permit to prescribe, shall issue any prescription for liquor.

Section 8 provides for printed blanks for prescriptions to be used by physicians.

Section 10, the section upon which the indictments in the instant case were framed, provides:

> "No person shall manufacture, purchase for sale, sell, or transport any liquor without making at the time a permanent record thereof showing in detail the amount and kind of liquor manufactured, purchased, sold, or transported, together with the names and addresses of the persons to whom sold, in case of sale, and the consignor and consignee in case of transportation, and the time and place of such manufacture, sale, or transportation. The commissioner may prescribe the form of such record, which shall at all times be open to inspection as in this Act provided."

The contention of the Government that this section of the Act should receive a literal interpretation and construction and should not be interpreted by a consideration of what goes before and what follows after it in the Act, it is respectfully submitted, is unsound.

That a particular section of a statute must be construed from the general view of the whole act of which it forms a part, as this statute was construed by the learned Court below, has been frequently and authoritatively decided.

In Vol. 26 A. and E. Ency. of Law, 616, it is said:

> "In construing a section of an act, regard must first be had to the language of the clause itself; and, second, to other clauses in the same act, and that construction should be adopted which makes the whole act stand consistently together, or reduces the inconsistency to the smallest possible limits."

In Vol. 36 CYC, page 1128, we read:

> "In construing a statute, the legislative intent is to be determined from a general view of the whole act,

with reference to the subject matter to which it applies and the particular topic under which the language in question is found."

"It is a cardinal rule in the construction of statutes that effect is to be given, if possible, to every word, clause and sentence. It is the duty of the Court, so far as practicable, to reconcile the different provisions so as to make them consistent and harmonious, and to give a sensible and intelligent intent to each."

In Vol. 25 R. C. L. Sec. 247, it is further said:

"Obviously, in order that effect may be given to every part of an act in accordance with the legislative intent, all the language of the act must be considered and brought into accord. It is not safe to base a construction upon a particular word or phrase, for the language of legislative enactments is not always precise and accurate, and, besides, one portion may frequently be designed to extend, quality, or limit another, that the meaning of one portion of a statute may depend upon the effect of another. Hence, it is an established rule in the exposition of statutes that the intention of the lawgiver is to be deduced from a view of the whole, and of every part of a statute taken and compared together."

In United States v. Boisdore's Heirs, 8 Howard 122, it was said:

"In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."

In United States v. Burr, 159 U. S. 84, Chief Justice Fuller, delivering the opinion of this Court, said inter alia:

"Moreover, in arriving at the true intention of Congress, we cannot treat section 1 as if it constituted the entire act but must deduce the intention from a view of the whole statute and from the material parts of it."

If the construction referred to in the authorities herein cited is adopted in the instant case, it is respectfully submitted that it must be held it was the intention of Congress, when it passed the National Prohibition Act, to provide that any one manufacturing, selling, purchasing, transporting or prescribing liquor should, before engaging in such practice, procure a permit from the Prohibition Commissioner and that, after such permit was granted, the person to whom the same had been granted, should make a permanent record thereof of the amount and kind of liquor which figured in the transaction of manufacture, purchase, sale or transportation. It is quite obvious that it was not the intention of Congress to provide that persons who had no right under the law to manufacture, sell, purchase for sale, or transport liquor should make a permanent record thereof of any act of manufacture, purchase, sale or transportation. It was only the lawful and permissible manufacture, sale, etc., which Congress had in mind when it provided for the making of a permanent record. This becomes even more apparent when consideration is given to the last clause of Section 10 of the Prohibition Act, which reads:

"The commissioner may prescribe the form of such record, which shall at all times be open to inspection as in this Act provided."

Surely it was never contemplated that the commissioner should prescribe a form of record for an illegal or non-permissible act of manufacture, sale, etc.

Further strength is added to the contention made here

on behalf of the defendants in error that Section 10 has no application to them in view of the fact that they were not permit holders by a consideration of Section 29 of the National Prohibition Act.

By the provisions of that section, it is provided:

> "Any person who manufactures or sells liquor in violation of this title shall for a first offense be fined not more than $1,000, or imprisoned not exceeding six months, and for a second or subsequent offense shall be fined not less than $200 nor more than $2,000 and be imprisoned not less than one month nor more than five years.
>
> "Any person violating the provisions of any permit, or who makes any false record, report, or affidavit required by this title, or violates any of the provisions of this title, for which offense a special penalty is not prescribed, shall be fined for a first offense not more than $500; for a second offense not less than $100 nor more than $1,000, or be imprisoned not more than ninety days; for any subsequent offense he shall be fined not less than $500 and be imprisoned not less than three months nor more than two years. It shall be the duty of the prosecuting officer to ascertain whether the defendant has been previously convicted and to plead the prior conviction in the affidavit, information, or indictment. The penalties provided in this Act against the manufacture of liquor without a permit shall not apply to a person for manufacturing nonintoxicating cider and fruit juices exclusively for use in his home, but such cider and fruit juices shall not be sold or delivered except to persons having permits to manufacture vinegar."

A consideration of the authorities construing and interpreting the Harrison Anti-Narcotic Act, containing similar provisions to the provisions of the National Prohibi-

tion Act now under consideration, would seem to indicate that the construction of the statute made by Judge Thompson in the Court below, when he sustained the demurrers to the indictments, was a proper one.

Section 1 of the Harrison Anti-Narcotic Act, Chap. 1, 38 Stat. 789, provides:

> "Every person who produces, imports, manufactures, compounds, deals in, dispenses, sells, distributes or gives away opium, or coca leaves, or any compound, manufacture, sale derivative, or preparation thereof, shall register with the Collector of Internal Revenue of the District his name or style, place of business, and place or places where such business is to be carried on."

Section 8 provides:

> "It shall be unlawful for any person not registered under the provisions of this Act, and who has not paid the special tax provided for by this Act, to have in his possession or under his control any of the aforesaid drugs; and such possession or control shall be presumptive evidence of a violation of this section and also a violation of the provisions of section 1 of this Act."

Numerous prosecutions have been instituted charging possession of drugs without registration. The Courts have uniformly held that possession, under section 8 of this Act, by "persons not registered under the provisions of this Act must be construed, with reference to section 1, which requires only certain persons to register, and that possession by persons not in the class defined constitutes no violation of the Act and indictments, charging possession by such persons, are defective and insufficient".

In UNITED STATES vs. WILSON, 225 Fed. 82, the defendant was indicted for the violation of the Act of

Congress approved December 17th, 1914, known as the "Harrison Anti-Narcotic Law".

The first section of this Act provides:

> "Every person who produces, imports, manufactures, compounds, deals in, dispenses, sells, distributes, or gives away opium, or coca leaves, or any compound, manufacture, sale derivative, or preparation thereof shall register with the Collector of Internal Revenue of the district his name or style, place of business, and place or places where such business is to be carried on."

The Bill of Indictment charged the defendant with the violation of Section 8 of the Act, which is as follows:

> "It shall be unlawful for any person not registered under the provisions of this Act, and who has not paid the special tax provided for by this Act, to have in his possession or under his control any of the aforesaid drugs."

In holding that the indictment charged no offense, Judge McCall of the Western District of Tennessee, said:

> "The question now arises, to whom does the clause 'any person not registered under the provisions of this Act and who has not paid the special tax' in the eighth section refer? Clearly, it refers to, and at least includes, those doing the things specifically named in the first section. Does it refer to and include others doing things not specifically named in the Act, viz., those having in their possession or under their control the drugs named for their personal consumption? It seems to me that to so hold would be for the Court to enlarge the list of those whom Congress required to register and pay the special tax. To that extent it would be an amendment of the Act. This is not the function of the Court. If Congress had intended

to require persons to register who had in their possession or under their control drugs for any purpose other than that stated in the Act, it would seem that it would have been a simple matter to have said so. It is clear to my mind that the language quoted from the eighth section, supra, when read in connection with the first section of the Act, refers only to those mentioned in the last named section, and however desirable it may be to have that list enlarged, the Court is without authority to do it."

In UNITED STATES vs. CARNEY, 228 Fed. 163, defendant was indicted on a charge of having violated the provisions of the Harrison Act in that the defendant had in his possession knowingly and unlawfully a large quantity of morphine without having registered his name and place of business with the Collector of Internal Revenue and without having paid the special tax required by the Act. A demurrer to the bill was filed. In sustaining the demurrer, it was there said:

"It seems quite clear that the Act in question is to be construed as one imposing a tax upon those who engage in dealing in and handling the drugs mentioned as a part of their business, and that a single sale, or having in possession a small quantity of the drug by one not engaged in the business of dealing in them, is not within the terms of this Act. . . . .

"The possession forbidden by this Section is of a person 'not registered under the provisions of this Act'. Plainly the person who has not so registered and paid the required tax refers only to one who is required by section 1 of the Act to register and pay such tax. No other possession is referred to by this section of which there can be a violation, other than the possession of one who is required by Section 1 to register and pay the tax. The section will reasonably bear no other interpretation; and as the defendant is

not charged with being a person required by the Act to register, or having engaged in any business that requires him to do so, the indictment fails to charge an offense against him under this Act. It was so held by Judge McCall in UNITED STATES v. FRIEDMAN, (D. C. 224 FED. 276) and UNITED STATES v. WILSON, 225 FED. 82, by Judge Borquin in UNITED STATES vs. WOODS, 224 FED. 278, and by Judge Thomson in UNITED STATES v. JIN FUEY MOY, 225 FED. 1003, upon indictments quite similar to the one in question."

In SWARTZ vs. UNITED STATES, 280 Fed. 115, the Circuit Court of Appeals for the Fifth Circuit in holding an indictment defective and insufficient to sustain a conviction said:

"It is insisted in this court that neither indictment, nor count, states an offense against the United States; that the Harrison Narcotic Act is a revenue statute, and the offense consists in the failure of those to register and pay the tax, who produce, import, manufacture, compound, deal in, dispense, sell, or give away opium, etc., as specified in the first section of the Act (section 6287g); that the offense denounced in the eighth section is the possession by those who are required to register, and not possession generally by all persons; and that an indictment which charges unlawful possession by one not registered, without alleging that he was one of the class required to register, charges no offense against the United States.

"We think that the objection is good and that the indictments are fatally defective. The offense is not the possession of morphine or cocaine, but the possession for some of the purposes for which registration is required; without having registered and paid the tax; and while proof of possession, under section 8 of the Act (section 6287n), casts the burden

of proof upon the defendant (Gee Woe v. United States, 250 Fed. 428, 162 C. C. A. 498), the indictment charges no violation of the Act, unless it charges that the possession was for a purpose for which registration is required, and that the accused had not registered. This we understand to be the decision of United States Supreme Court in the case of United States v. Jin Fuey Moy, 241 U. S. 394, 36 Sup. Ct. 658, 60 L. Ed. 1061, Ann. Cas. 1917 D, 854. To this effect are the following cases: United States v. Bernstein, (D. C.) 255 Fed. 339; United States v. Carney (D. C.) 228 Fed. 163; United States v. Woods (D. C.) 224 Fed. 278."

In UNITED STATES v. JIN FUEY MOY, 241 U. S. 394, an appeal was taken from the action of Judge Thomson of the District Court for the Western District of Pennsylvania, quashing an indictment framed upon the provisions of the Harrison Anti-Narcotic Act. The indictment charged a conspiracy by the Defendant with Willie Martin to have in Martin's possession opium. It averred that Martin was not registered with the Collector of Internal Revenue and had not paid the special tax required. Mr. Justice Holmes at the end of an exhaustive opinion in affirming the judgment of the District Court, which held that no offense was charged, said:

"Approaching the issue from this point of view we conclude that 'any person not registered' in section 8 cannot be taken to mean any person in the United States but must be taken to refer to the class with which the statute undertakes to deal—the persons who are required to register by section 1. It is true that the exemption of possession of drugs prescribed in good faith by a physician is a powerful argument taken by itself for a broader meaning. But every question of construction is unique, and an argument

that would prevail in one case may be inadequate in another. This exemption stands alongside of one that saves employees of registered persons as do sections 1 and 4, and nurses under the supervision of a physician, &c., as does section 4, and is so far vague that it may have had in mind other persons carrying out a doctor's orders rather than the patient's. The general purpose seems to be to apply to possession exemptions similar to those applied to registration. Even if for a moment the scope and intent of the act were lost sight of the proviso is not enough to overcome the dominant considerations that prevail in our mind."

In the instant case, there were no averments in the bills of indictment that the defendants were persons named or contemplated in the sixth section of the National Prohibition Act, that is, persons who were engaged in the practice or business of manufacturing, selling, etc., liquor and who were under an obligation to secure a permit before they could engage in such business.

It is, therefore, respectfully submitted that, giving effect to the entire National Prohibition Act and particularly to that part under the heading Title II, Congress intended to prohibit the manufacture, sale, etc., of liquor by all persons, with certain specified exceptions, and this is provided for in section 3 of the Act. That for a violation of section 3, a penalty was provided in the first part of Section 29, wherein a fine of not more than $1,000 or imprisonment not exceeding six months was provided for a first offense, and for second offenses a fine of not less than $200 nor more than $2,000 and imprisonment of not less than one month nor more than five years was provided; that, after enacting section 3, Congress provided for the regulation of the manufacture, production, use and sale of liquor by providing for the issuance of per-

mits, the dispensing of liquor by prescription, etc., and by section 10 of the act directed that all persons who had permission under the provisions of the Act to deal in liquor should keep a permanent record of their dealings.

DEPARTMENTAL CONSTRUCTION OF TREASURY DEPARTMENT NEGATIVES CONSTRUCTION CONTENDED FOR BY THE GOVERNMENT.

As an aid in the construction of the section of the statute now under consideration, recourse may be had to the rules and regulations prescribed by the Prohibition Unit of the Bureau of Internal Revenue of the Treasury Department.

By Section 10 of the National Prohibition Act, the Commissioner is given the right to prescribe the form of permanent records to be kept of the manufacture, purchase for sale, sale or transportation of liquor.

Regulations 60, revised March, 1924, which are the last regulations prescribed, provide for the matter of such records to be kept in sections 170 to 174 inclusive. In these regulations, the commissioner has provided for and prescribed records only for permit holders. He has not attempted to prescribe records for non-permit holders nor has he made any rules requiring the keeping of such records.

Section 180 of these regulations has to do with the inspections of records and gives authority to inspect the premises of permittees only.

It thus becomes apparent that, by the interpretation placed upon the National Prohibition Act by the administrative branch of the Government charged with its enforcement, provision is made only for the keeping of records by persons who are lawfully permitted to deal in liquor.

having them produce either copies of the records or the original records, and in such event the defendant would not fall under or be entitled to the immunity of Section 30.

It is submitted that BOYD v. UNITED STATES, 116 U. S. 616, condemns such legislative requirements as being in violation of the provisions of the Fourth and Fifth Amendments.

The facts of that case were as follows: The Act of June 22nd, 1874 authorized a court, in revenue cases, on motion of Government attorney, to require the defendant or claimant of goods to produce his private books in court or otherwise the allegations of the attorney were to be taken as confessed.

The Trial Court made an order directing the defendant to produce the invoice or paper relating to the importation of merchandise, which was the subject of the Customs Revenue law, so that the United States attorney and his assistants should be allowed before the court and under its direction to make an examination of the invoice or paper and to take copies thereof.

In holding that the order directing the production of the paper or invoice and the allowance of an inspection of it by the United States attorney was improper and illegal and offended against the Fourth and Fifth Amendments of the Constitution of the United States, the Court, in an opinion by Justice Bradley said:

> "The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence;

but it is the invasion of his indefeasible right of personal security; personal liberty and private property, where that right has never been forfeited by his conviction of some public offence,—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other."

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"We think that the notice to produce the invoice in this case, the order by virtue of which it was issued, and the law which authorized the order, were unconstitutional and void, and that the inspection by the district attorney of said invoice, when produced in obedience to said notice, and its admission in evidence by the court, were erroneous and unconstitutional proceedings."

In the case at bar, it is respectfully submitted, that the provisions of section 10 of the National Prohibition Act as applicable to persons holding permits to deal in liquor is a constitutional exercise of the legislative power and this is consistent with the opinion delivered by the learned Court below; whereas if section 10 is held to be applicable, to persons who hold no permits to engage in transactions relating to liquor, then by its provisions the non-permit holder is compelled to incriminate himself by making a record showing his unlawful transaction and such a legislative requirement is in clear conflict with the provisions of the Fourth and Fifth Amendments to the Constitution of the United States.

For the reasons herein given, it is respectfully submitted, that the judgment of the Court below, sustaining the demurrers and quashing the indictments, should be affirmed.

Respectfully submitted,

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